BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:	)	
[redacted]	)	NO.: 00-45.1
	)	DUE PROCESS HEARING

FINAL ORDER

Jack E. Seaman
Administrative Law Judge
611 Commerce Street, Suite 2704
Nashville, Tennessee 37203
615/255-0033
Prof. Resp. No. 4058
December 21, 2000

FINAL ORDER

This proceeding involves the validity and appropriateness of the transfer of a county special education student to the city school system by the "transition agreement" between the county and city boards of education following annexation by the city of an area including several of the county schools but not the residential area of the student. This 14 year old student was one of five county students with multiple disabilities transferred by this agreement. This student has severe seizures and is on different kinds of medications taken daily. She is subject to seizures at any time and is also developmentally delayed. This student and parents were not represented by counsel. This was the second Due Process Hearing held on the same date involving essentially the same issues for two of these multiple disability students so transferred. Parents of both students testified at each hearing.

ISSUES

The hearing in this matter was set on short notice with the agreement of all and no briefs or legal memoranda were submitted. It was generally agreed that the same issues would be considered as presented in the other hearing this date. The three issues identified prior to the hearing in the related case, and which will be addressed in this Final Order, are as follows:

1. Did the county school system have authority to transfer the student to the city school system?

2. Did the transfer violate the student's/parent's procedural rights?

3. Is the current educational placement appropriate for the student?

THE DUE PROCESS HEARING

This hearing followed a related hearing involving essentially the same circumstances but a different student and parents. These parents represented themselves and the hearing was somewhat abbreviated compared to the previous hearing. A summary of a portion of the evidence provides the factual basis for this Final Order.

In opening, the parents stated their student should be placed in the county high school closest to their residence and not in a city school. The annexation of the school was not an annexation of the residence of the student who remained in the county and, therefore, the student should not be assigned to a city school.

The county school system's position was that the transition agreement providing for the transfer of students, including special education students who lived in the county and outside of the area annexed by the city, to the city school for the 2½ year period while the city was building new schools, etc., was in conformity with State and Federal law. The county maintained that any question about the IEP or services should be addressed to the city school system rather than the county school system.

The mother testified she was never notified before the county school system opened this year that the student would be attending a city school. She testified that at the IEP Team meeting there was no discussion about the student attending a city school but only that she would be sent to a high school environment. She had written a letter to the county Director of Special Education in May requesting the student be allowed to return to the middle school for the 2000-2001 school year and had never received an answer. A copy of the letter dated May 11, 2000, was offered as an exhibit.

The mother testified that they had moved from the city to the county approximately 5 or 6 years earlier so that their student could attend the county school. The student had been in the city school system for 2 or 3 years and the parents had not been pleased so they moved to the county to have their student in a better program.

Prior to the 2000-2001 school year opening, the mother received a notice about transportation from the county and on the first day of county school, August 14, she and her husband took the student to the middle school she had previously attended because that was where the bus driver told them she would be going. Upon arriving at the school, they were told the student was not to attend there but was in the city school system now. The parents were given a name in the city school system to call. The mother called the city school system representative and was told they did not know where the student would be placed. The city

representative called later that afternoon saying a teacher had been found and requesting the student to be registered.

The mother went to register the student at the city school as requested, looked into the special education room, and then met with the special ed teacher and filled out all the paperwork. The teacher did not have the student's records and the teacher indicated they were trying to put together services for the student. The parent testified she had not attended an IEP Team meeting with the city school system and did not understand how the city could have an IEP.

On cross-examination the mother acknowledged that at the IEP Team meeting in March of 2000 it was mentioned as a possibility that the student might attend city schools.

The parent called the county Director of Special Education as a witness and asked what the time frame was for notifying parents of a change in the school or curriculum for a student. The director testified that a change in placement meant a change in the type of program and not a change to a different school. Therefore, there was no rule or requirement that there be a notice for a change of school/location.

The director testified the decision for the student to go to a city school was made when the transition agreement was signed in December of 1998. The director testified she had not seen the letter dated May 11, 2000, until August 30 when it came with materials related to the Due Process Hearing Request. Also, she acknowledged the school system had not provided

notification/information concerning low cost legal assistance or attorneys even though requested.

On further questioning by the parent it was pointed out that the letter addressed to the director May 11 noted copies were sent to the principal and teacher. The witness had talked to those people but assumed they thought she had the letter and never discussed it with her. The mother testified she placed postage on the original and two copies and mailed all three of them. She had talked with the teacher probably the next day or so and knew she received her copy. The teacher testified she had received her copy and knew the principal had also because they discussed it. However, she had never discussed it with the director.

The teacher read a portion of the IEP and explained that it provided for the student's curriculum to be in a small group setting so she could maintain and reach goals, basically a contained classroom because the student did not participate in the curriculum in a regular education program. The teacher testified the middle school had been a good school for the student to accomplish her goals and the student had special equipment and needed a structured small group setting.

It was clear throughout the testimony that the school system did not individually consider whether this student should remain at the middle school. The reason that she was not allowed to stay there was because of her age and because she had been there "the certain amount of time that they allow."

Exhibit 5 was introduced by the student as a copy of a document provided by the county school system in preparation for the Due Process Hearing. It appears to be an occupational therapy progress note dated August 22, 2000, where the therapist consulted with the special ed teacher and reviewed the student's chart but could find no IEP. There is a notation that the student had been transferred from the county school system.

The school system recalled the county Director of Special Education as its first witness. Exhibit 5 was part of the records she had obtained from the city school system to provide as a basis of information for this hearing. She explained that Exhibit 5 said no city school IEP had been found and that would be accurate because the city schools had not done their own IEPs but only adopted the county IEPs.

The witness explained IEP Teams were to make decisions based on the individual students and, although there were strong guidelines about the age of the students in middle schools, it was a Team decision and not a decision she could make as to whether the student would remain at a middle school rather than being transferred to a high school.

The Special Ed Curriculum Coordinator for the middle school, was called as a witness. She was the IEP Team leader and minute taker for the spring 2000 IEP. She testified that "placement" means the services needed. The witness testified at the time of the IEP Team meeting they could not direct the student to a specific school because she would be going to the city school

system and the parent would need to contact the city school system for further information although Kirby would be the home school.

This witness testified the IEP Team could not make a decision as to whether to allow a student to remain in the middle school another year. Upon further questioning, the witness changed her answer about whether the IEP Team could make a decision about the student remaining at the middle school and essentially said that it had been a Team decision.

DISCUSSION

Did the county school system have authority to transfer the student to the city school system?

This student is a resident of the county who has been transferred to the city school system. The parents expressed the opinion that their student should be served by the county in the county school system. The school system's position is that the transfer to the city school system pursuant to the transition agreement is legal and the county now has no legal obligation for serving this student.

Title 49 of Tennessee Code Annotated is entitled "Education". Chapter 10 of Title 49 is "Special Education" and applicable in this proceeding. Provisions of Chapter 10, specifically §49-10-107 and §49-10-305 do grant one school district authority to contract with another school district to provide special

education services.[1] Based upon these statutory provisions alone, a county school district would have authority to contract with a school district to provide special education services to a county student. The question becomes whether the transfer in this case would fall within the authority granted by statute. Nothing presented to the undersigned Administrative Law Judge would prohibit one school district from contracting with another to provide educational services under the terms of a "transfer" as presented in this case and, therefore, it would appear that the county would have legal authority to enter into such a contract.

The agreement does not contain the provision required by T.C.A. §49-10-306 that the child and parent "shall continue to have all civil and other rights that the child would have if receiving like education or related services within the subdivision or school district where the child would normally attend public school." The statutory provision provides that no such contract is valid unless it contains this provision, However, there is no question but that the student, if the student had no disability, would be attending the same school, the city school, even though a resident of the

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[1] § 49-10-107 provides that "Nothing in parts 1-6 of this chapter shall be construed to prevent a school district from providing educational, corrective or supporting services for children with disabilities by contracting with another school district to provide such services for children with disabilities from such other district."

§49-10-305 provide, in part, that "school district may enter into agreements with other districts or states to provide such special education; provided, that a child receiving special education outside the school district in which the child would normally attend public school shall continue to be the responsibility of such school district . . ."

county and, therefore, would be attending this same school in question if attending "where the child would normally attend public school."

Did the transfer violate the student's/parents' procedural rights?

The parents assert they were not provided the required procedural safeguards they were entitled to in the change of placement for their student. The school takes the position that assignment of the student to the city high school pursuant to the agreement between the city and county school is not a change in placement so as to trigger any procedural requirements or notice under Federal law.

It is logical to think of placement as the location where the student is assigned to receive educational services. This may well be a placement. However, it appears from the authorities that a change in placement "does not occur when a student is transferred from one school to another with a comparable program." Morgan v. Chris L., No. 94-6561 (6th Cir. January 21, 1997), 1997 U.S. App. LEXIS 1041, citing Tilton v. Jefferson County Board of Education, 705 F.2d 800 (6th Cir. 1983), cert. denied, 465 U.S. 1006 (1984). See, e.g. Morris by Morris v. Metropolitan Government of Nashville, 26 IDELR 159 (U.S.D.Ct.M.D.TN No, 3:96-1112, June 24, 1997). There may remain some question as to whether the program was comparable in the city school facility, whether a change from the home school district to another school system constitutes a change in

placement, and whether the parents were permitted to participate in the IEP Team process as intended; however, under the proof presented no change in placement triggering the procedural requirements occurred.

Is the current educational placement appropriate for the student?

The assertion of the parents is essentially that it is not appropriate to take a resident county student out of a good program and place her in an inferior program in the city school system. The county school system's position is that the parents must address any questions regarding the provision of educational services for their student to the city school system which is not a party to this proceeding. As noted before, the county takes the position that signing the transition agreement completely removed the student from their responsibility. A concern of the undersigned at the hearing was that the county school system was telling a resident county student they were gone from the county system and, although the county might take them back in a year, the county did not care what happened to them between now and then.

Although the appropriateness of the IEP contents was not challenged in these proceedings, the appropriateness of where they could or would be delivered was challenged. The events between the Spring 2000 IEP Team meeting and the start of school in the county and then the city, together with the county school system's position that this student is not their responsibility certainly

raises an issue of whether the development and implementation of the IEP for this student is appropriate.

The county school system remains responsible for the provision of special education and related services to this student. Generally speaking, the student's resident school district is responsible for identifying eligible students and providing FAPE. The authorities in T.C.A. §49-10-305(a), 34 C.F.R. 104.31-39 (104.33(a), (b)(3), and 104.34 in particular) and 34 C.F.R. 300.340-350 (300.341 in particular) confirm this principle and lead to the conclusion that the county remains responsible for this student. The evidence presented does not establish the county has not fulfilled this responsibility. However, from the time of the IEP Team meeting in March 2000, and maybe even before, the county school system determined this student was not their responsibility. When the IEP was developed for the student, the members did not know where, who, or how it might be implemented. The members of the IEP Team in March 2000 and those who testified at the Due Process Hearing in the fall of 2000 knew virtually nothing about any educational program for the student. The position of the county school system was that it had no responsibility to the student or parents for the education of the student.

This is a student whose parents moved to the county from the city so that the student could be educated in the county school system and by the county school system. This student reportedly would be educated in the city school system, and by the city school system, for the one year as a result of the annexation agreement

between the city and the county and then the student would be returning to the county school system, to be educated by the county school system, presumably for the remainder of her years of special education.

Although the parents have done all they could do to ensure that their student would be served by the county school system and not the city school system because they believe, or know, it provides a better educational opportunity for the student, the special education authorities do not require that the student receive the best available education, only an appropriate education. See, e.g. Renner v. Board of Education, 185 F.3d 635 (6th Cir. 1999); Wise v. Ohio Department of Education, 80 F.3d 177 (6th Cir. 1996); Doe v. Board of Education, 9 F.3d 455 (6th Cir. 1993) cert. denied, 511 U.S. 1108 (1994); and, cases cited therein. The only challenge to the appropriateness is that it is offered and provided in a city school setting for a student who is a resident of the county school district. Under the evidence presented it has not been proven that what has been offered and provided is not appropriate under the special education laws.

FINDINGS AND CONCLUSIONS

1. This student is eligible for special education and related services under IDEA and Tennessee statutory provisions.

2. The county did have authority to transfer a special education student to the city school system for special education and/or related services.

3. The transfer did not violate the student's/parents' procedural rights because it was not intended to be a change in services provided and, although it was transferring the student from the county school system to the city school system, it was intended to provide educational services in the same school where the student would receive educational services if the student had no disabilities.

4. The student has not been discriminated against by the county because of any disability in the transfer of the student to the city school system.

5. The student and parents are residents of the county and not of the city.

6. The location and provision of IEP services was not determined upon consideration of the individual needs of the student.

7. The county school system remains responsible for providing this special education student with a free appropriate public education (FAPE). The county has erroneously taken the position that the transition agreement "dropped" the student to the city school system, absolved the county from any responsibility to the student or her parents, and the parents and student must seek satisfaction from the city.

8. The evidence does not establish that the county school system has failed to provide this student with FAPE. Although the county did not know what, where or who would provide services for this student when the IEP was prepared, the evidence does not

establish that the IEP is not appropriate and/or has not been implemented.

RELIEF

The county school system must provide this student with FAPE. The specific provisions of the IEP developed in March 2000 have not been challenged and may currently be appropriate. The student may be receiving FAPE. However, it is the responsibility of the county to ensure that the educational and related services are provided in an appropriate setting and this would include necessary transportation. This is not to say that FAPE cannot be provided through a contract with the city school system; however, the obligation remains with the county to see that this student is provided FAPE.

Based upon the evidence presented and the findings and conclusions, the student and parents are not entitled to any relief requested. However, the county school system must address any request for an IEP Team meeting concerning this student.

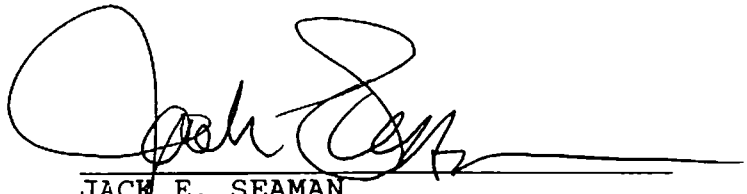
ORDER

It is, hereby, ORDERED as follows:

1. The parents are not entitled to an order requiring the student to be served by the county in a county school by county employees.

2. The county school system remains responsible for the development and implementation of special education and related services for this student and must address any request for an IEP team meeting concerning this student.

Entered this 21st day of December, 2000.



JACK E. SEAMAN
ADMINISTRATIVE LAW JUDGE
611 Commerce Street, Suite 2704
Nashville, Tennessee 37203
615/255-0033
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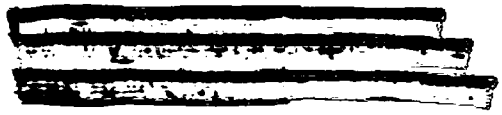
NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

CERTIFICATE OF SERVICE

I hereby certify that a true and copy of the foregoing document has been sent by mail, with sufficient postage prepaid, to the following on this 21st day of December, 2000:



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